

**Martin J. Fears d/b/a Guarantee Drywall and
Painters District Council No. 2 and Trustees of
the Painters District Council No. 2 Trust
Funds. Case 14-CA-21735**

March 24, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND OVIATT

Upon a charge and amended charge filed by Painters District Council No. 2 (the Union) and Trustees of the Painters District Council No. 2 Trust Funds, the General Counsel of the National Labor Relations Board issued a complaint on January 13, 1992, against Martin J. Fears d/b/a Guarantee Drywall, the Respondent, alleging that it has violated Section 8(a)(1) and (5) of the National Labor Relations Act. Although properly served copies of the charge, the amended charge, and complaint, the Respondent has failed to file an answer.

On February 7, 1992, the General Counsel filed a Motion for Summary Judgment. On February 11, 1992, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response. The allegations in the motion are therefore undisputed.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

Section 102.20 of the Board's Rules and Regulations provides that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. The complaint states that unless an answer is filed within 14 days of service, "all of the allegations in the complaint shall be considered to be admitted to be true and shall be so found by the Board." Further, the undisputed allegations in the Motion for Summary Judgment disclose that counsel for the General Counsel, by letter dated January 29, 1992, notified the Respondent that unless an answer was received by February 3, 1992, a Motion for Summary Judgment would be filed.

In the absence of good cause being shown for the failure to file a timely answer, we grant the General Counsel's Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a sole proprietorship with an office and place of business in O'Fallon, Missouri, has been engaged in the installation and finishing of drywall and metal stud framing in the construction industry doing commercial construction and at all times material herein has been a member of the Painters and Decorating Contractors of America, herein the Association. The Association has at all times material herein been an organization composed of various employers engaged as paint and drywall contractors in the construction industry, one purpose of which is to represent its employer-members in negotiating and administering collective-bargaining agreements with various labor organizations including the Union. During the 12-month period ending November 30, 1991, members of the Association, including Respondent, collectively performed services valued in excess of \$50,000 in states other than the State of Missouri. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Recognition

In or about April 1990 the Respondent, an employer engaged in the building and construction industry, granted recognition to the Union as the exclusive collective-bargaining representative of the employees in the unit set forth below by entering into a collective-bargaining agreement between the Union and the Association for the period September 1, 1988, to August 31, 1991, succeeded by an agreement for the period September 1, 1991, through August 31, 1994, without regard to whether the majority status of the Union had ever been established under the provisions of Section 9 of the Act.

The following employees of the Respondent constitute a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All journeyman painters, tapers and drywall finishers, paper and wallcovering hangers, apprentices, pre-apprentices, summer help and working foremen employed by members of the Association and of the employers who have authorized the Association to bargain on their behalf, including Respondent, but excluding all other employees.

For the period of April 1990 to August 31, 1994, based on the principles established in *John Deklewa & Sons*, 282 NLRB 1375 (1987), *enfd. sub nom. Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988), *cert. denied* 488 U.S. 889 (1988), the Union has been and is the limited exclusive collective-bargaining representative of the unit.

B. Refusal to Bargain

Since on or about August 31, 1991, Respondent has failed to continue in full force and effect the terms and conditions of the agreements referred to above by failing to abide by the following provisions: sections 35, 36, 37, 38, 39, and 40 requiring contributions to the Union's pension, health and welfare, vacation and apprenticeship funds, submission to the Union of weekly fringe benefit reports and of weekly dues deductions from employees' pay.

The terms and conditions of employment of the agreements the Respondent failed to continue in full force and effect, as described above, are mandatory subjects of bargaining.

The Respondent took these actions without having notified or afforded the Union an opportunity to negotiate and bargain as the limited exclusive representative of the unit employees, and without the Union's consent.

CONCLUSION OF LAW

By its failure on and after August 31, 1991, to continue in full force and effect all the terms and conditions of the collective-bargaining agreements, by failing to abide by sections 35, 36, 37, 38, 39, and 40 requiring contributions to the Union's pension, health and welfare, vacation and benefit funds, submission to the Union of weekly fringe benefit reports and of weekly dues deductions from employees' pay, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

We shall order the Respondent to make all contractually required payments, reports, and remission of dues it failed to make since August 31, 1991.¹

¹ Because the provisions of employee benefit fund agreements are variable and complex, we leave to the compliance stage the question of whether the Respondent must pay any additional amounts into the benefit

The Respondent shall also make its employees whole for any losses attributable to its failure to make the contractually required payments, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), *enfd. mem.* 661 F.2d 940 (9th Cir. 1981). All payments to employees, and weekly dues deductions, shall be made with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

ORDER

The National Labor Relations Board orders that the Respondent, Martin J. Fears d/b/a Guarantee Drywall, O'Fallon, Missouri, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with Painters District Council No. 2 as the limited exclusive representative of its employees in the bargaining unit by failing to abide by sections 35, 36, 37, 38, 39, and 40 of the collective-bargaining agreements with the Union by failing to make contractually required contributions to the Union's pension, health and welfare, vacation and apprenticeship funds and failing to submit to the Union weekly fringe benefit reports and weekly dues deductions from employees' pay.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Continue in full force and effect all the terms and conditions of the collective-bargaining agreement with the limited exclusive collective-bargaining representative of the employees in the following appropriate unit:

All journeyman painters, tapers and drywall finishers, paper and wallcovering hangers, apprentices, pre-apprentices, summer help and working foremen employed by members of the Association and of the employers who have authorized the Association to bargain on their behalf, including Respondent, but excluding all other employees.

(b) Make all contractually required contributions required under sections 35, 36, 37, 38, 39, and 40 of the collective-bargaining agreements with the Union and submit to the Union weekly fringe benefit reports and weekly dues deductions from em-

ployees in order to satisfy our "make whole" remedy. See *Merryweather Optical Co.*, 240 NLRB 1213, 1216 (1979).

ployees' pay, as provided in the remedy section of this decision.

(c) Make unit employees whole for any loss of benefits or other expenses suffered as a result of the Respondent's failure to make the contractually required contributions required by sections 35, 36, 37, 38, 39, and 40 of the collective-bargaining agreements with the Union, or as a result of its failure to submit to the Union weekly fringe benefit reports and weekly dues deductions from employees' pay, as provided by the remedy section of this decision.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amounts due under the terms of this Order.

(e) Post at its facility in O'Fallon, Missouri, copies of the attached notice marked "Appendix."² Copies of the notice, on forms provided by the Regional Director for Region 14, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

² If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain collectively with Painters District Council No. 2 as the limited ex-

clusive collective-bargaining representative of our employees in the following appropriate unit:

All journeyman painters, tapers and drywall finishers, paper and wallcovering hangers, apprentices, pre-apprentices, summer help and working foremen employed by members of the Association and of the employers who have authorized the Association to bargain on their behalf, including Respondent, but excluding all other employees.

WE WILL NOT fail or refuse to continue in full force and effect all the terms and conditions of the agreements by failing to abide by sections 35, 36, 37, 38, 39, and 40 of the collective-bargaining agreements with the Union by failing to make contractually required contributions to the Union's pension, health and welfare, vacation and apprenticeship funds and failing to submit to the Union weekly fringe benefit reports and weekly dues deductions from employees' pay.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL continue in full force and effect all the terms and conditions of the collective-bargaining agreements with the Union.

WE WILL make all contributions required by sections 35, 36, 37, 38, 39, and 40 of the collective-bargaining agreements with the Union for the Union's pension, health and welfare, vacation and apprenticeship funds and WE WILL submit to the Union weekly fringe benefit reports and weekly dues deductions from the employees' pay, with interest.

WE WILL make our unit employees whole for any loss of benefits or other expenses suffered as a result of our failure to abide by sections 35, 36, 37, 38, 39, and 40 of the collective-bargaining agreements with the Union, with interest.

MARTIN J. FEARS D/B/A GUARAN-
TEE DRYWALL